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Biodiversity Project

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

LEAGUE OF WILDERNESS DEFENDERS /
BLUE MOUNTAINS BIODIVERSITY
PROJECT

Plaintiff,

v.

SLATER R. TURNER, *et al.*,

Defendants.

Case No. 2:16-CV-01648-MO

**DECLARATION OF R. SCOTT
JERGER IN SUPPORT OF
PLAINTIFF'S REQUEST FOR
ATTORNEY FEES**

I, R. SCOTT JERGER, state and declare as follows:

1. I make this declaration in support of a motion for attorney fees pursuant to the Equal Access to Justice Act (EAJA) filed by plaintiff League of Wilderness Defenders/Blue Mountains Biodiversity Project.

QUALIFICATIONS

2. I was admitted to the Texas State Bar in 1997. I was admitted to the Oregon State Bar in 2002. I was admitted to the Washington State Bar in 2010. I am admitted to practice law in the United States District Courts for the District of Oregon, the Western District of Washington, and the Eastern District of Texas, the Southern District of Texas, the District of Colorado, the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the Federal Circuit, and the United States Supreme Court.

3. I graduated in 1997 from the University of Texas School of Law. I received an LLM in Environmental and Natural Resources law (*cum laude*) in 2003 from the Northwestern School of Law at Lewis and Clark College.

4. From 1998–1999, I worked as an Assistant City Attorney for the City of El Paso, Texas. From 2000–2002, I worked as an Assistant Public Interest Counsel for the Texas Natural Resource Conservation Commission (nka the Texas Commission on Environmental Quality). Since 2003, I have maintained a private law practice focusing on federal public interest environmental law, environmental clean-up litigation, and commercial litigation. In 2006, I was named partner in the law firm of Field Jerger LLP.

5. In 2011, I was the chairperson of the Federal Practice and Procedure Committee of the Oregon State Bar.

6. I am currently an adjunct professor at Lewis and Clark Law School teaching Environmental Litigation since 2012.

7. I have litigated cases in federal district court in Oregon, Washington, Texas, Colorado, and California, the Ninth Circuit Court of Appeals, and the Court of Appeals for the

Federal Circuit. I have litigated cases in the Pendleton Division of the United States District Court for the District of Oregon.

8. In my current private practice, I represent non-profit environmental organizations and citizen groups, such as the plaintiff in this case, in litigation and in pre-litigation activities involving the Clean Water Act, National Forest Management Act, National Environmental Policy Act, and the Natural Gas Act. I have represented League of Wilderness Defenders/Blue Mountains Biodiversity Project in numerous timber sale lawsuits similar to this lawsuit going back to 2003. These include *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. US Forest Service*, 585 Fed. Appx. 613 (9th Cir. 2014); *League of Wilderness Defenders v. US Forest Service*, 549 F.3d 1211 (9th Cir. 2008); and *League of Wilderness Defenders/Blue Mountains Biodiversity Project*, 2005 WL 3307087 (D. Or. June 6, 2005).

9. My current environmental litigation practice includes representation of for profit companies and individuals (as both plaintiffs and defendants) in cost recovery and contribution actions under Oregon's environmental clean-up laws. A very large part of my environmental practice also involves large multi-party toxic and hazardous waste cleanup sites, *i.e.* Superfund.

10. I have lectured on environmental topics at professional conferences, most recently at the Northwest Environmental Business Council in a presentation entitled "Managing Stormwater in Oregon" on June 22, 2016 and on May 22, 2015. Previous recent presentations include "Remand without Vacatur-A new remedy," and "NPDES Permit Enforcement: Upholding the promise of the Clean Water Act" at the Public Interest Environmental Law Conference in March 2014.

11. Additionally, I have written about the CWA. I have been published in the Stanford Environmental Law Journal: *EPA's New CAFO Land Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 Stan. Env. L. J. 91 (2004).

12. I also have significant non-environmental federal court litigation experience in the area of commercial litigation, specifically intellectual property litigation. I represented Kai USA, the maker of Kershaw Knives and Shun Cutlery, in successfully defending a false patent marking claim in Texas federal court. From 2006-2010, I defended a software patent and copyright holder in an intellectual property lawsuit in the Northern District of California and in the Court of Appeals for the Federal Circuit. *Jacobsen v. Katzer*, (N.D. Ca, C06-1905 JSW); (CAFC 2008-1001; 2009-1221). This case was the first case to address the validity of copyright licensing for open source software and is very well-known in this community.

13. In 2014, my then current rate of \$395/hr was found to be reasonable by this Court. *League of Wilderness Defenders v. U.S. Forest Service*, 3:10-cv-01397-SI, Order and Opinion on Fees, July 15, 2014 [Dkt.#143]. My current rate for public interest environmental litigation is \$455/hr.

MATERIALS REVIEWED

14. In order to render an opinion, I have reviewed the attorney and law student time records in support of Plaintiff's motion for attorney fees, the complaint, the preliminary injunction briefing from both parties, the motion to dismiss briefing from both parties, the declarations of Mr. Buchele and Mr. Buss, and the orders in this case.

RATES REQUESTED

15. Based upon my review of this case, and based upon my personal knowledge of attorneys' billing practices in the Northwest and Portland in particular, I believe that the hourly rate of \$475/hr sought by counsel Thomas Buchele is reasonable and would be charged by attorneys of equivalent experience and expertise in this type of case. It is my opinion that Mr. Buchele's requested rate is reasonable for Portland, Oregon.

16. I have known Mr. Buchele since 2008. I am very familiar with his work. I have co-counseled one case with him (*LOWD v. USFS*, 585 Fed. Appx. 613 (9th Cir. 2014)), read many of his briefs, participated on CLE panels with him on environmental law topics, and co-taught the Environmental Litigation class at Lewis & Clark Law School with him since 2012. I have been consistently impressed with the high quality of his work, his commitment to the practice of environmental law, and his attention to detail. Mr. Buchele is well-known and highly respected for his work and his commitment to public interest causes, both among public interest lawyers, environmental law professors, and among environmentalists in this region and nationwide.

17. Mr. Buchele's rate is \$20/hr more than my current rate. I have been practicing law for 20 years and Mr. Buchele has been practicing law for 30 years. Mr. Buchele has been practicing exclusively public interest environmental law for 19 years. In the case I co-counseled with Mr. Buchele, this Court awarded me a rate of \$395/hr and Mr. Buchele a rate of \$450/hr. *See League of Wilderness Defenders v. U.S. Forest Service*, 3:10-cv-01397-SI, Order and Opinion on Fees, July 15, 2014 [Dkt.#143]. In my opinion, this order conclusively demonstrates that Mr. Buchele's current rate is reasonable. This order is final and was not appealed by the Forest Service. Mr. Buchele's rate is only \$25/hr more than his rate in 2014

which this Court found reasonable. This is an appropriate step-up in his rate. Indeed, I have increased my rate by \$60/hr since 2014.

18. Since I litigate cases under public interest fee shifting statutes and since I also work for paying clients, I am familiar with attorney billing rates in Oregon, particularly in Portland. It is my opinion that the requested billing rate for Mr. Buchele is reasonable compared to a lawyer of his similar experience in private practice in Portland, Oregon. In conclusion, Mr. Buchele's rate of \$475/hr is very reasonable for a case such as this.

19. Environmental litigation is a specialty area justifying an upward adjustment of EAJA fees. In my opinion, Mr. Buchele undoubtedly possesses distinctive knowledge and skills necessary to claim a practice specialty in environmental law that warrants the rates he seeks. Mr. Buchele has considerable experience in environmental litigation, in particular cases NFMA and NEPA cases like this.

20. Skills in environmental litigation were necessary for this case. Knowledge of the procedural and substantive environmental laws, NEPA and NFMA, was necessary in my opinion, to successfully prosecute this case as it allowed the lawyers to focus on the relevant documents they needed. Additionally, since this case relates to the Forest Service's decision to categorically exclude the project from NEPA analysis, knowledge of NEPA was essential to this case.

21. Only a few attorneys in Oregon know how to litigate a NEPA and NFMA case and have the ability, and the wherewithal to pursue such a case as this. In my experience, I know this type of case is risky and many attorneys will not undertake it, because the chances of recovering attorneys' fees at fair market rates can be slim, and any recovery may come long after the work is done.

22. I have also reviewed the hourly rates of Mr. Jesse Buss in this case. I have reviewed Mr. Buss's declaration in support of Plaintiff's fee petition. I have reviewed the 2012 Oregon State Bar Economic Survey (OSB Survey) and specifically the statements on the OSB survey referenced in Mr. Becker's declaration in support of Plaintiff's fee petition. Based on the OSB survey, I believe that a rate of \$250/hr is reasonable for a lawyer with five years of experience similar to Mr. Buss.

23. I have also reviewed the hourly rates of the law students in this case. Based on my experience in private practice in Portland, Oregon I believe that \$130/hr is a reasonable rate for a paralegal. In my opinion, a law student is comparable in some ways to a paralegal. I am aware of paralegals in Portland that bill \$175/hr. Therefore, I believe this rate is reasonable.

HOURS REQUESTED

24. I have reviewed the complaint, the memoranda in support of and opposition to the motion for preliminary injunction, the opinion and order granting plaintiff's motion for a preliminary injunction, and the memoranda in support of and the response to the motion to dismiss in this case, and the order granting plaintiff's motion to dismiss. I have also reviewed the attorney time records outlining their activities in this case. Additionally, as part of my own fee recovery work, I have read a number of opinions on fee recovery issues from this Court and from the U.S. Court of Appeals for the Ninth Circuit. It is my opinion that the hours sought by plaintiff's counsel are reasonable and appropriate in this case.

25. It is my experience and opinion that litigating cases against governmental agencies, especially cases involving NEPA, is time-consuming and complex. I believe the attorneys' time records, and the course of the proceedings, justify the hours they expended and

seek to recover fees for. I also believe that the amount of time spent by the law students was reasonable. This was a complex case with environmental and NEPA issues and these attorneys and law students obtained an excellent result. It is also my opinion that the attorneys exercised proper billing judgment by eliminating or reducing many otherwise recoverable time entries in their time sheets.

26. As part of my practice I have litigated cases in eastern Oregon, including the Pendleton Division of the U.S. District Court. In my opinion, there are no attorneys in Pendleton that are willing or qualified to take on a case such as this one.

27. Lastly, I do not find that any of the work performed was duplicative. Complex environmental cases require at least two attorneys, and I believe this case was no exception.

28. I spent 5.7 hours reviewing the pleadings and time entries in this case and drafting this declaration. I performed this work at a rate of \$455/hr, a rate that is appropriately stepped from my 2014 rate of \$395/hr, which is a rate that has been found reasonable by this Court.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 17th day of July 2017 at Portland, Oregon,

/s/ R. Scott Jerger
R. Scott Jerger, OSB#023377